

Claimant requested preliminary benefits of temporary total disability compensation and medical treatment before the Administrative Law Judge in a preliminary hearing that was held on June 9, 1995. In addition to the claimant's testimony that is contained in the preliminary hearing transcript, deposition testimony of three current employees of the respondent and one former employee of the respondent compose the preliminary hearing record. The Administrative Law Judge found that the claimant had not proven that she met with a personal injury by accident that arose out of and in the course of her employment with the respondent. From that Order claimant appeals and argues that the evidentiary record proves that she suffered a work-related injury while employed by the respondent. On the other hand, respondent contends that the Appeals Board should affirm the

Administrative Law Judge's Preliminary Hearing Order as the evidentiary record does not contain competent credible evidence to establish that claimant suffered an accidental injury while working for the respondent.

Claimant alleges that sometime during a work-shift, which started on March 2, 1995 at 10:15 p.m. and ended at 6:15 a.m. on March 3, 1995, she injured her back, right arm and right shoulder while performing her work duties as a CNA for the respondent. Claimant testified that she was asked to work overtime on the morning of March 3, 1995, but could not because she felt terrible and had to go straight home to bed. Claimant did work the next night but was only able to get through the shift because she was training a new employee and she did not do any heavy lifting. Claimant did not seek medical treatment on March 3, 1995 because she felt that she only had a pulled muscle and that it would go away in a couple of days. She was not scheduled to work on March 4, and returned to work on March 5, 1995.

Claimant finally sought medical treatment with a chiropractor, Dr. Lyle R. Timmons, on March 6, 1995. After the chiropractic treatment, she notified Donna Skillett, Director of Nursing for the respondent, that she had been injured at work. At that time, claimant requested medical treatment from the respondent, but did not receive authorization for such treatment until March 8, 1995. Claimant testified that she was unable to handle the pain and went on her own for medical treatment to Dr. Joann Mace at the Hays Medical Center. After claimant saw Dr. Mace, the respondent contacted her and gave her approval to see a Dr. Bhargava. Claimant saw Dr. Bhargava on March 9, 1995 who referred her back to Dr. Mace for continuing treatment. Dr. Mace's diagnosis was cervical and shoulder girdle sprain/strain bilaterally and bicipital tendinitis. Dr. Mace took her off of work and released her to return to light work on March 30, 1995. On the date of the regular hearing, June 9, 1995, claimant remained in the employment of the respondent on light duty with work restrictions of no single lift over ten (10) pounds and no overhead lifting.

Claimant had Cynthia Moeder, a fellow employee at the respondent's nursing home, testify on her behalf. She established that the morning of March 3, 1995 the claimant said she felt bad and the witness observed that claimant looked bad that morning. Claimant also requested Wilma Carr, a CMA with the respondent, to testify and Ms. Carr established claimant was at the nursing station on the morning of March 3, 1995, and claimant told her that she had hurt her shoulder but did not know how it happened. She further stated that claimant had a pale look to her.

Jeff Janousek, a staff nurse for the respondent, testified that at the time claimant had a sling on her arm at work, he overheard claimant state to another employee that she had hurt her arm but that it didn't happen at work. Donna Skillett, Director of Nursing for the respondent, testified that she was first aware that the claimant was making a claim for a work-related injury on March 6, 1995 when claimant called and informed her that she had gone to a chiropractor because she had hurt her shoulder. Claimant first told Donna that she had hurt her shoulder on March 1. However, claimant changed her story to March 2, 1995 after being told she was not scheduled to work on March 1, 1995. Donna also indicated that she overheard claimant tell a co-worker, on March 3, that she had some right shoulder pain and she thought she slept on it wrong. Verlene Wilson, a charge nurse for the respondent, also testified, establishing that she had asked the claimant to work overtime on the morning of March 3, 1995, but claimant had indicated that she had to go home and rest up for the next shift. Claimant did not, however, tell Verlene that she had hurt herself at work.

The Appeals Board finds that the Administrative Law Judge had an opportunity to personally observe and assess the credibility of the claimant in this case. In his Order he specifically mentioned that he found the testimony of Jeff Janousek, who testified he overheard the claimant tell a co-worker that she had hurt her arm but that it did not happen

at work, as persuasive. For preliminary hearing purposes, the Appeals Board affirms the Preliminary Hearing Order entered by Administrative Law Judge George R. Robertson on June 23, 1995, and finds that the claimant has failed to prove that it is more probably true than not that her back, shoulder and arm injuries occurred while performing her work duties for the respondent.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order of Administrative Law Judge George R. Robertson, dated June 23, 1995, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of September, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert A. Anderson, Ellinwood, Kansas
Richard A. Boeckman, Great Bend, Kansas
George R. Robertson, Administrative Law Judge
Philip S. Harness, Director